

1 HOUSE BILL NO. 529

2 INTRODUCED BY J. DOOLING

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PLANNING, ZONING, AND
5 SUBDIVISION REGULATION LAWS; PROVIDING ADDITIONAL CRITERIA TO CONSIDER WHEN
6 ADOPTING ZONING AND SUBDIVISION REGULATIONS; ALLOWING THE RESIDENTS OF AN
7 UNINCORPORATED AREA TO PETITION THE BOARD OF COUNTY COMMISSIONERS TO CREATE A
8 COUNTY PLANNING BOARD; PROVIDING ADDITIONAL METHODS FOR GRANTING VARIANCES TO
9 ZONING AND SUBDIVISION REGULATIONS; ALLOWING THE BOARD OF APPEALS TO HEAR
10 ADDITIONAL ARGUMENTS; AND AMENDING SECTIONS 76-1-104, 76-2-221, 76-2-223, 76-2-227, 76-3-103,
11 76-3-501, 76-3-506, AND 76-8-101, MCA."

12

13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

14

15 **NEW SECTION. Section 1. Zoning regulation derivations -- provision for granting variances. (1)**

16 Zoning regulations adopted under this part may be derived from general goals and regulations as well as
17 specific regulations that apply to a specific parcel and achieve a tangible regulatory purpose.

18 (2) A property owner's interest in the use and value of the property shall:

19 (a) supersede general goals when a variance is sought; and

20 (b) not supersede a specific regulation.

21 (3) The governing body holds a rebuttable presumption that a specific regulation is the least restrictive
22 measure required to achieve intended purposes based on best evidence as it applies to a parcel.

23 (4) A property owner may seek a variance based on specific or general regulations if the property
24 owner:

25 (a) can prove the regulation substantially impairs the use or value of the property;

26 (b) offers a viable alternative approach based on best evidence that achieves substantially the same
27 effect of the regulation; or

28 (c) can prove that the regulation is not based on best evidence.

1 (5) As used in this section, the following definitions apply:

2 (a) "Best evidence" means evidence that provides the best empirically based explanatory power, the
3 most compelling, equitable argument, and the least bias.

4 (b) "General goal" or "general regulation" means a goal or regulation that may be intangible or that
5 may not relate directly to the property in question clearly and readily ascertainable. Examples of a general goal
6 or regulation include but are not limited to:

7 (i) the amount of open space;

8 (ii) the preservation of view sheds or their equivalent; or

9 (iii) the character of the community.

10 (c) "Specific regulation" means a regulation designed for a specific parcel and may include but is not
11 limited to a regulation regarding:

12 (i) lot size restriction based on tangible considerations of water availability, services, and fire
13 mitigation;

14 (ii) set back requirements;

15 (iii) use restrictions; and

16 (iv) ingress and egress requirements.

17 (d) "Substantial impairment" means an impairment of the use or value of the property as judged by a
18 reasonable person to be greater than a de minimis amount.

19

20 **Section 2.** Section 76-1-104, MCA, is amended to read:

21 **"76-1-104. Procedure to establish county planning board -- protest.** (1) Before a county planning
22 board may be created, the board of county commissioners shall by resolution give public notice of their intent to
23 create ~~such a~~ a planning board and of a public hearing ~~thereon on it~~ thereon by publication of notice of time and place of
24 hearing on ~~such the~~ the resolution in each newspaper published in the county not less than 15 or more than 30
25 days prior to the date of hearing.

26 (2) The board of county commissioners shall by resolution give notice of intent to create a planning
27 board as provided in subsection (1) if a majority of the electors that meet the qualifications provided in
28 subsection (3) sign a petition for the creation of a planning board.

- 1 (3) An elector is eligible to sign a petition as allowed in subsection (2) if the elector resides:
 2 (a) in the county;
 3 (b) outside the limits of the jurisdictional area of a city-county planning board established pursuant to
 4 76-1-504 through 76-1-507;
 5 (c) outside of the incorporated limits of each city and town in the county; and
 6 (d) in an area that conforms to a reasonably definable geographic or development pattern.

7 ~~(2)~~(4) A resolution creating a county planning board shall not be adopted by the board of county
 8 commissioners if disapproved in writing, not later than 60 days after ~~such~~ the hearing, by a majority of the
 9 qualified electors of the county residing outside the limits of the jurisdictional area of an existing city-county
 10 planning board established pursuant to 76-1-504 through 76-1-507 and outside the incorporated limits of each
 11 city and town in the county."

12

13 **Section 3.** Section 76-2-221, MCA, is amended to read:

14 **"76-2-221. Board of adjustment.** (1) The board of county commissioners shall provide for the
 15 appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority
 16 of this part shall provide that the board of adjustment may, in appropriate cases and subject to appropriate
 17 conditions and safeguards, make special exceptions to the terms of the zoning resolution in harmony with its
 18 general purposes and intent and in accordance with the general or specific rules of this part.

19 (2) The board of adjustment shall adopt rules in accordance with the provisions of any resolution
 20 adopted pursuant to this part. Meetings of the board of adjustment must be held at the call of the presiding
 21 officer and at times that the board may determine. The presiding officer or in the presiding officer's absence the
 22 acting presiding officer may administer oaths and compel the attendance of witnesses.

23 (3) The board of adjustment shall consider:
 24 (a) the social, economic, and environmental impact of regulation; and
 25 (b) viable alternatives and best evidence presented by property owners whose property use or value
 26 has been substantially impaired by regulation.

27 (4) As used in this section, "best evidence" means evidence that provides the best empirically based
 28 explanatory power, the most compelling, equitable argument, and the least bias."

1

2 **Section 4.** Section 76-2-223, MCA, is amended to read:

3 **"76-2-223. Powers of board of adjustment.** (1) The board of adjustment shall have the following
4 powers:

5 (a) to hear and decide appeals ~~where~~ in which it is alleged there is error in any order, requirement,
6 decision, or determination made by an administrative official in the enforcement of this part or of any resolution
7 adopted pursuant ~~thereto~~ to this part;

8 (b) to hear and decide special exceptions to the terms of the zoning resolution ~~upon which said that~~
9 the board is required to pass under such the resolution;

10 (c) to authorize upon appeal in specific cases ~~such a~~ variance from the terms of the resolution ~~as will~~
11 ~~not be that is not~~ contrary to the public interest and where in which, owing to special conditions, a literal
12 enforcement of the provisions of the resolution will result in unnecessary hardship and so that the spirit of the
13 resolution ~~shall~~ must be observed and substantial justice ~~done.~~ done; and

14 (d) to hear petitions for variance from a property owner whose property is substantially hindered in
15 use and value who can provide best evidence for a less-restrictive approach that achieves substantially the
16 same effect while reducing the hindrance to the use and value of the property.

17 (2) In exercising the above-mentioned powers, the board of adjustment may, in conformity with the
18 provisions of this part, reverse or affirm, wholly or partly, or modify the order, requirement, decision, or
19 determination appealed from and may make ~~such the~~ the order, requirement, decision, or determination as ought to
20 be made and to that end shall have all the powers of the officer from whom the appeal is taken.

21 (3) As used in this section, "best evidence" means evidence that provides the best empirically based
22 explanatory power, the most compelling, equitable argument, and the least bias."

23

24 **Section 5.** Section 76-2-227, MCA, is amended to read:

25 **"76-2-227. Appeals -- board of county commissioners or board of adjustment to court of record**
26 **-- county commissioners may establish appeal process.** (1) (a) The board of county commissioners may
27 establish in the zoning regulations a process for an appeal of a decision by the board of adjustment to the
28 board of county commissioners by any person or persons, jointly or severally, aggrieved by a decision of the

1 board of adjustment or an officer, department, board, or bureau of the county.

2 (b) The process, if established, must provide that an appeal to the board of county commissioners be
3 initiated by presenting to the board of county commissioners a petition, duly verified, setting forth that the
4 decision is illegal, in whole or in part, and specifying the grounds of the illegality.

5 (c) The petition must be presented to the board of county commissioners within 30 days after the filing
6 of the decision of the board of adjustment, and a final decision must be made within 60 days of receipt of the
7 petition.

8 (d) The board of county commissioners may:

9 (i) remand the special exception to the board of adjustment;

10 (ii) reverse or affirm, wholly or partly, the decision of the board of adjustment; or

11 (iii) modify the decision of the board of adjustment.

12 (2) Any person or persons, jointly or severally, aggrieved by a decision of the board of county
13 commissioners or the board of adjustment may present to a court of record a petition, ~~duly verified~~ accordingly,
14 setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The
15 petition must be presented to the court within 30 days after the filing of the decision in the office of the
16 appropriate board.

17 (3) Upon presentation of a petition, the court may allow a writ of certiorari directed to the board of
18 county commissioners or the board of adjustment to review the decision of the board and shall prescribe in the
19 writ the time within which a return must be made and served upon the relator's attorney, which may not be less
20 than 10 days and may be extended by the court. The allowance of the writ may not stay proceedings upon the
21 decision appealed from, but the court may, upon application, on notice to the board of county commissioners or
22 the board of adjustment, and on due cause shown, grant a restraining order. The board of county
23 commissioners or the board of adjustment may not be required to return the original papers acted upon by it,
24 but it is sufficient to return certified or sworn copies of the original papers or of portions of the original papers
25 that may be called for by the writ. The return must concisely set forth other facts that may be pertinent and
26 material to show the grounds of the decision appealed from and must be verified.

27 (4) If, upon the hearing, it appears to the court that testimony is necessary for the proper disposition
28 of the matter, the court may take evidence or appoint a referee to take evidence as it may direct and report the

1 evidence to the court with the referee's findings of fact and conclusions of law, which constitute a part of the
 2 proceedings upon which the determination of the court must be made.

3 (5) The court may reverse or affirm, wholly or partly, or may modify the decision brought up for
 4 review.

5 (6) An established and accepted variance taken from one petition for variance constitutes compliance
 6 of other property owners who have substantially similar conditions that meet the applicable regulatory goal. The
 7 county is responsible for providing the burden of proof to determine that a variance is not applicable in
 8 subsequent cases."

9

10 **Section 6.** Section 76-3-103, MCA, is amended to read:

11 **"76-3-103. Definitions.** As used in this chapter, unless the context or subject matter clearly requires
 12 otherwise, the following definitions apply:

13 (1) "Best evidence" means evidence that provides the best empirically based explanatory power, the
 14 most compelling, equitable argument, and the least bias.

15 (2) "Certificate of survey" means a drawing of a field survey prepared by a registered surveyor for the
 16 purpose of disclosing facts pertaining to boundary locations.

17 ~~(2)~~(3) "Cluster development" means a subdivision with lots clustered in a group of five or more lots
 18 that is designed to concentrate building sites on smaller lots in order to reduce capital and maintenance costs
 19 for infrastructure through the use of concentrated public services and utilities, while allowing other lands to
 20 remain undeveloped.

21 ~~(3)~~(4) "Dedication" means the deliberate appropriation of land by an owner for any general and public
 22 use, reserving to the landowner no rights that are incompatible with the full exercise and enjoyment of the
 23 public use to which the property has been devoted.

24 ~~(4)~~(5) "Division of land" means the segregation of one or more parcels of land from a larger tract held
 25 in single or undivided ownership by transferring or contracting to transfer title to a portion of the tract or properly
 26 filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to
 27 this chapter. The conveyance of a tract of record or an entire parcel of land that was created by a previous
 28 division of land is not a division of land.

1 ~~(5)~~(6) "Examining land surveyor" means a registered land surveyor appointed by the governing body
2 to review surveys and plats submitted for filing.

3 ~~(6)~~(7) "Final plat" means the final drawing of the subdivision and dedication required by this chapter to
4 be prepared for filing for record with the county clerk and recorder and containing all elements and
5 requirements set forth in this chapter and in regulations adopted pursuant to this chapter.

6 ~~(7)~~(8) "Governing body" means a board of county commissioners or the governing authority of a city
7 or town organized pursuant to law.

8 ~~(8)~~(9) "Immediate family" means a spouse, children by blood or adoption, and parents.

9 ~~(9)~~(10) "Minor subdivision" means a subdivision that creates five or fewer lots from a tract of record.

10 ~~(10)~~(11) "Phased development" means a subdivision application and preliminary plat that at the time of
11 submission consists of independently platted development phases that are scheduled for review on a schedule
12 proposed by the subdivider.

13 ~~(11)~~(12) "Planned unit development" means a land development project consisting of residential
14 clusters, industrial parks, shopping centers, or office building parks that compose a planned mixture of land
15 uses built in a prearranged relationship to each other and having open space and community facilities in
16 common ownership or use.

17 ~~(12)~~(13) "Plat" means a graphical representation of a subdivision showing the division of land into lots,
18 parcels, blocks, streets, alleys, and other divisions and dedications.

19 ~~(13)~~(14) "Preliminary plat" means a neat and scaled drawing of a proposed subdivision showing the
20 layout of streets, alleys, lots, blocks, and other elements of a subdivision that furnish a basis for review by a
21 governing body.

22 ~~(14)~~(15) "Public utility" has the meaning provided in 69-3-101, except that for the purposes of this
23 chapter, the term includes county or consolidated city and county water or sewer districts as provided for in Title
24 7, chapter 13, parts 22 and 23, and municipal sewer or water systems and municipal water supply systems
25 established by the governing body of a municipality pursuant to Title 7, chapter 13, parts 42, 43, and 44.

26 ~~(15)~~(16) "Subdivider" means a person who causes land to be subdivided or who proposes a
27 subdivision of land.

28 ~~(16)~~(17) "Subdivision" means a division of land or land so divided that it creates one or more parcels

1 containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States
 2 government section, exclusive of public roadways, in order that the title to the parcels may be sold or otherwise
 3 transferred and includes any resubdivision and a condominium. The term also means an area, regardless of its
 4 size, that provides or will provide multiple spaces for rent or lease on which recreational camping vehicles or
 5 mobile homes will be placed.

6 ~~(17)~~(18) (a) "Tract of record" means an individual parcel of land, irrespective of ownership, that can be
 7 identified by legal description, independent of any other parcel of land, using documents on file in the records of
 8 the county clerk and recorder's office.

9 (b) Each individual tract of record continues to be an individual parcel of land unless the owner of the
 10 parcel has joined it with other contiguous parcels by filing with the county clerk and recorder:

11 (i) an instrument of conveyance in which the aggregated parcels have been assigned a legal
 12 description that describes the resulting single parcel and in which the owner expressly declares the owner's
 13 intention that the tracts be merged; or

14 (ii) a certificate of survey or subdivision plat that shows that the boundaries of the original parcels have
 15 been expunged and depicts the boundaries of the larger aggregate parcel.

16 (c) An instrument of conveyance does not merge parcels of land under subsection ~~(17)(b)(i)~~ (18)(b)(i)
 17 unless the instrument states, "This instrument is intended to merge individual parcels of land to form the
 18 aggregate parcel(s) described in this instrument" or a similar statement, in addition to the legal description of
 19 the aggregate parcels, clearly expressing the owner's intent to effect a merger of parcels."
 20

21 **Section 7.** Section 76-3-501, MCA, is amended to read:

22 **"76-3-501. Local subdivision regulations.** (1) The governing body of every county, city, and town
 23 shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing
 24 for:

25 ~~(1)~~(a) the orderly development of their jurisdictional areas;

26 ~~(2)~~(b) the coordination of roads within subdivided land with other roads, both existing and planned;

27 ~~(3)~~(c) the dedication of land for roadways and for public utility easements;

28 ~~(4)~~(d) the improvement of roads;

- 1 ~~(5)~~(e) the provision of adequate open spaces for travel, light, air, and recreation;
- 2 ~~(6)~~(f) the provision of adequate transportation, water, and drainage;
- 3 ~~(7)~~(g) subject to the provisions of 76-3-511, the regulation of sanitary facilities;
- 4 ~~(8)~~(h) the avoidance or minimization of congestion; and
- 5 ~~(9)~~(i) the avoidance of subdivisions that would involve unnecessary environmental degradation and
- 6 danger of injury to health, safety, or welfare by reason of natural hazard, including but not limited to fire and
- 7 wildland fire, or the lack of water, drainage, access, transportation, or other public services or that would
- 8 necessitate an excessive expenditure of public funds for the supply of the services.

9 (2) Subdivision regulations adopted under this part may be derived from general goals and

10 regulations as well as specific regulations that apply to a specific parcel and achieve a tangible regulatory

11 purpose.

12 (3) A property owner's interest in the use and value of the property:

13 (a) must supersede general goals when a variance is sought; and

14 (b) may not supersede a specific regulation.

15 (4) The governing body holds a rebuttable presumption that a specific regulation is the least-

16 restrictive measure required to achieve the intended purpose based on best evidence as it applies to a parcel.

17 (5) When adopting regulations allowed in this section, the governing body shall use the best evidence

18 available and create a rebuttable presumption that adopted regulations are based on the best evidence.

19 (6) As used in this section, the following definitions apply:

20 (a) "General goal" or "general regulation" means a goal or regulation that may be intangible or that

21 may not relate directly to the property in question clearly and readily ascertainable. Examples of a general goal

22 or general regulation include but are not limited to:

23 (i) the amount of open space;

24 (ii) the preservation of view sheds or their equivalent; or

25 (iii) the character of the community.

26 (b) "Specific regulation" means a regulation designed for a specific parcel and may include but is not

27 limited to a regulation regarding:

28 (i) lot size restriction based on tangible considerations of water availability, services, and fire

- 1 mitigation;
 2 (ii) setback requirements;
 3 (iii) use restrictions; and
 4 (iv) ingress and egress requirements."

5

6 **Section 8.** Section 76-3-506, MCA, is amended to read:

7 **"76-3-506. Provision for granting variances.** (1) Subdivision regulations may authorize the
 8 governing body, after a public hearing on the variance request before the governing body or its designated
 9 agent or agency, to grant variances from the regulations when strict compliance will result in undue hardship or
 10 a substantial impairment to property use or value and when it is not essential to the public welfare.

11 (2) Any variance granted pursuant to this section must be based on specific variance criteria
 12 contained in the subdivision regulations.

13 (3) A minor subdivision as provided for in 76-3-609(2) is not subject to the public hearing requirement
 14 of this section.

15 (4) A property owner may seek a variance based on specific or general regulations as provided in 76-
 16 3-501 if the property owner:

17 (a) can prove the regulation substantially impairs the use or value of the property;

18 (b) offers a viable, alternative approach based on best evidence that achieves substantially the same
 19 effect of the regulation; or

20 (c) can prove that the regulation is not based on best evidence.

21 (5) As used in this section, "substantial impairment" means an impairment of the use or value of the
 22 property as judged by a reasonable person to be greater than a de minimis amount."

23

24 **Section 9.** Section 76-8-101, MCA, is amended to read:

25 **"76-8-101. Definitions.** As used in this part, the following definitions apply:

26 (1) "Building" means a structure or a unit of a structure with a roof supported by columns or walls for
 27 the permanent or temporary housing or enclosure of persons or property or for the operation of a business.

28 Except as provided in 76-3-103~~(46)~~(17) the term includes a recreational camping vehicle, mobile home, or cell

1 tower. The term does not include a condominium or townhome.

2 (2) "Department" means the department of environmental quality provided for in 2-15-3501.

3 (3) "Governing body" means the legislative authority for a city, town, county, or consolidated city-
4 county government.

5 (4) "Landowner" means an owner of a legal or equitable interest in real property. The term includes
6 an heir, successor, or assignee of the ownership interest.

7 (5) "Local reviewing authority" means a local department or board of health that is approved to
8 conduct reviews under Title 76, chapter 4.

9 (6) "Supermajority" means:

10 (a) an affirmative vote of at least two-thirds of the present and voting members of a city or town
11 council;

12 (b) a unanimous affirmative vote of the present and voting county commissioners in counties with
13 three county commissioners;

14 (c) an affirmative vote of at least four-fifths of the present and voting county commissioners in
15 counties with five commissioners;

16 (d) an affirmative vote of at least two-thirds of the present and voting county commissioners in
17 counties with more than five commissioners; or

18 (e) an affirmative vote of at least two-thirds of the present and voting members of the governing body
19 of a consolidated city-county government.

20 (7) "Tract" means an individual parcel of land that can be identified by legal description, independent
21 of any other parcel of land, using documents on file in the records of the county clerk and recorder's office."

22
23 **NEW SECTION. Section 10. Codification instruction.** [Section 1] is intended to be codified as an
24 integral part of Title 76, chapter 2, part 2, and the provisions of Title 76, chapter 2, part 2, apply to [section 1].

25 - END -